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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 584

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

—against—

NATIONAL SCREEN SERVICE CORPORATION,
Respondent.

REPLY BRIEF

POINT I

California law and New York law are identical on the point as to the meaning to be given to words in insurance contracts.

Respondent (p. 11 of its brief), in an attempt to avoid the impact of the *Azteca* case, states there is a dramatic contrast between the California rule and the New York rule.

The California rule is said to be:

> "The test to be applied by the Court in determining whether there is ambiguity is not what the insurer intended its words to mean, but *what a reasonably prudent person applying for insurance would have understood them to mean.*" *General*

Casualty Company of America v. *Azteca Films, Inc.*, 278 F (2d) 161, 167 (C.A., 9th, 1960) (Italics ours).

This is correct.

The New York rule is said to be:

"(An insurer) to derive any benefit from the exclusory clause, was obliged to show * * * that its own construction was the *only one* that fairly could be placed on the policy." *Sincoff* v. *Liberty Mutual Fire Insurance Co.*, 11 N. Y. (2d) 386 (1962).

This is not quite right.

While *Sincoff* is New York law it is not the true analogue of *Azteca*. The New York rule is found in many cases such as *Abrams* v. *Great American Insurance Company of New York*, 269 N. Y. 90, 92 (1935) and *Lachs* v. *Fidelity & Casualty Company of New York*, 306 N. Y. 357, 364 (1954).

In *Abrams* the New York Court of Appeals phrased the rule as follows:

"The language employed in the contract of insurance must be given *its ordinary meaning, such as the average policyholder of ordinary intelligence, as well as the insurer, would attach to it*" (Italics ours).

In *Lachs* it was said:

"* * * a contract of insurance, drawn by the insurer, must be read through the eyes of *the*

> *average man on the street or the average housewife who purchases it*" (Italics ours).

A mere glance shows the identity of the two states' rules.

Further the *Sincoff* rule is identical with the California law.

The Supreme Court of California stated in *Arenson v. National Automobile and Casualty Insurance Company,* 45 Cal. (2d) 81, 83, 286 P (2d) 816, 818 (1955):

> "The understanding of an ordinary person is the standard used in construing a contract of insurance, and any ambiguity in language must be resolved against the insurer. It is also the rule that *exceptions and exclusions are construed strictly against the insurer* and liberally in favor of the insured" (Italics ours).

But this is no different than saying, as in *Sincoff,* that in order to uphold an exclusory clause the insurer must show that its construction was "the *only one* that fairly could be placed on the policy".

Therefore, there is no "dramatic contrast" between the law of the two states, and respondent's statement (p. 10 of its brief) that California does not favor the insured is without warrant.

In judicially construing what the word "possession" means to "the reasonably prudent person" (*Azteca,* Calif.), "the average policyholder of ordinary intelligence" (*Abrams,* N. Y.), or "the average man on the street or the average housewife" (*Lachs,* N. Y.), the rule is identical in New York and California.

New York says:

> "The courts have repeatedly held that the interpretation of a clause in a policy of insurance is to be determined by what it means to the ordinary businessman, not what it might convey on careful analysis to a trained lawyer". *Whiteside* v. *Insurance Company of Pennsylvania,* 274 App. Div. 36, 38, 79 N.Y.S.(2d) 715, 717 (1st Dept., 1948).

California says:

> "The policy should be read as a layman would read it and not as an attorney or an insurance expert might read it". *Hobson* v. *Mutual Benefit Health and Accident Association, Inc.*, 99 Cal. App. (2d) 330, 333, 221 P (2d) 761 (1950).

Respondent's claimed distinction between the California and New York rules is just not so, and in light of the above decisions, available to all the Bar, should not have been urged in this Court.

Thus *Azteca* and the case at bar are in absolute conflict.

POINT II

The Court of Appeals below clearly did not follow New York law which it was required to do.

This is apparent from the above.

We do not say that the conflict between the Ninth and Second Circuits is *standing by itself* necessarily sufficient reason for granting the writ.

But when there is added to this conflict such a clear failure to follow the governing rule of the New York courts then supervision of the federal judiciary would call for a review. All the more so when it is quite apparent (see generally the dissenting opinion (App. 13-17)) that respondent actually was unjustly granted a coverage he never purchased, and the impact of this decision nationally will be unduly harsh.

Sufficient reason appears, based upon the conflict and the failure to follow New York law, for the petition to be granted.

Dick v. *New York Life Insurance Company*, 359 U. S. 437 (1959);
Gibson v. *Phillips Petroleum Co.*, 352 U. S. 874 (1956).

POINT III

Added to the above reasons for granting the writ is the national significance of the decision below on uncommitted courts.

This has been amply discussed at pages 13-16 of the petition and uncommented upon by respondent.

Since the preparation of the petition the decision below (364 F(2d) 275) was reported on the front page of the New York Law Journal (Sept. 29, 1966) whereupon reports of concussive disquiet began to filter in from those members of the Bar constantly engaged in this type litigation. The national effect of this decision will be soon realized.

CONCLUSION

It is petitioner's position that this case unquestionably has the necessary elements for a granting of certiorari: a conflict, a failure to follow the binding rule of law, and national concern.

The only real question on the petition is whether this Court can afford time to consider this case, in view of some of the monumental cases soon to be reviewed.

It is our position that, in a way, this is a class action and that the class itself needs a resolution of this conflict. If possible, certiorari should be granted.

Respectfully submitted,

JAMES P. SHANNON
Attorney for Petitioner
100 Maiden Lane
New York, New York

JAMES M. GILLERAN
Of Counsel